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# Simplify, Simplify, Simplify-An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System

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# **SIMPLIFY, SIMPLIFY, SIMPLIFY—AN ANALYSIS OF TWO DECADES OF JUDICIAL REVIEW IN THE VETERANS’ BENEFITS ADJUDICATION SYSTEM**

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*Rory E. Riley\**

## **ABSTRACT**

Prior to the Veterans’ Judicial Review Act, the Department of Veterans Affairs existed in “splendid isolation,” meaning that the Department was insulated from judicial review by statute. After the due process revolution of the 1960s and pressure from various veterans’ organizations after the Vietnam War, Congress passed the Veterans’ Judicial Review Act in 1988. The Act created the U.S. Court of Appeals for Veterans Claims, an Article I court with exclusive jurisdiction over decisions by the Board of Veterans’ Appeals. This Article argues that twenty years after the Veterans’ Judicial Review Act was implemented, the system has become more complex, requiring Congress to amend the Veterans Affairs (VA) adjudication system. Specifically, this article advocates that one of the many levels of regional office review should be eliminated and that the Board of Veterans’ Appeals should be regionalized to simplify the system and provide more timely decisions to our nation's veterans.

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## I. INTRODUCTION

“Simplify, simplify, simplify!”<sup>1</sup> In analyzing the past two decades of judicial review in the veterans’ benefits adjudication system, Henry David Thoreau’s declaration from his renowned work *Walden* comes to mind. Although twenty years of judicial review has, overall, proven to be a positive addition to the veterans’ benefits arena, it has added an extra layer of review to an already complicated system. Thus, in celebrating the twentieth anniversary of judicial review, Congress would be wise to heed Thoreau’s advice and “simplify” the many layers of review in the veterans’ benefits adjudication system.

In 1988, the Veterans’ Judicial Review Act (VJRA)<sup>2</sup> dramatically affected the veterans’ benefits adjudication system by establishing the United States Court of Appeals for Veterans Claims (CAVC). The CAVC is an Article I court that was enacted to provide external judicial review of decisions by the Board of Veterans’ Appeals (BVA).<sup>3</sup> The implementation of judicial review caused the BVA to make several significant improvements to its adjudication process. For example, early CAVC decisions required the BVA to include a statement of “reasons or bases” for its findings and conclusions, to eliminate its panel of experts format, and to refrain from using its own medical judgment in rendering BVA decisions.<sup>4</sup>

Nonetheless, a closer look at the Department of Veterans Affairs reveals that twenty years after the VJRA was implemented, the system has become even more complex than it was prior to judicial review. Although many envisioned the newly created CAVC as a resource to simplify the veterans’ benefits adjudication process,<sup>5</sup> judicial review has further complicated the system due to varied effects on the BVA and the Regional Office (RO) levels of review.<sup>6</sup> In this regard, most adjudicators at the RO levels are not attorneys and do not possess any formal legal training.<sup>7</sup> Therefore, at the initial levels of the veterans’ benefits adjudication process, judicial review has not produced great improvements because those adjudicating veterans’ claims are not only overwhelmed by their

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<sup>1</sup> HENRY DAVID THOREAU, *WALDEN* 66 (Signet Books 1949) (1854).

<sup>2</sup> Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

<sup>3</sup> UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS HISTORY, <http://www.uscourts.cavc.gov/about/History.cfm> (last visited Sept. 15, 2010) [hereinafter CAVC HISTORY].

<sup>4</sup> Charles L. Cragin, *A Time of Transition at the Board of Veterans’ Appeals*, 38 FED. B. NEWS & J. 500, 501–02 (1991); see also *Colvin v. Derwinski*, 1 Vet. App. 171 (1991); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

<sup>5</sup> James T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 248 (2001).

<sup>6</sup> See BOARD OF VETERAN’S APPEALS, *HOW DO I APPEAL?* 3 (2002), available at <http://www.bva.va.gov/docs/Pamphlets/010202A.pdf>.

<sup>7</sup> Jeffrey Parker, *Two Perspectives on Legal Authority Within The Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 216 (2009).

enormous workload, but are also not properly trained to utilize and apply CAVC decisions.<sup>8</sup> In fact, eight years after the implementation of judicial review, Frank Q. Nebeker, former Chief Judge of the CAVC, testified before Congress that the “VA had made no significant improvements in implementing the [CAVC]’s decisions at its VARO’s [Veterans’ Affairs Regional Office].”<sup>9</sup> Accordingly, some scholars have argued that judicial review “put veterans in only a marginally better position than they were in before the [VJRA was enacted].”<sup>10</sup>

Despite this flaw, it is unfair to say that judicial review has not produced any benefits to the veterans’ benefits adjudication system. Most importantly, judicial review has provided veterans with their “day in court,” and has brought the VA into alignment with modern notions of due process.<sup>11</sup> In addition, the quality of BVA decisions has improved, and the CAVC has provided a medium for debating the validity of VA regulations. As a result, a much-needed body of case law on veterans’ benefits issues has developed.<sup>12</sup>

Thus, after two decades of judicial review, the veterans’ benefits adjudication system has improved, but it has also become more complex. The twentieth anniversary of judicial review provides those involved with the veterans’ benefits adjudication system a valuable opportunity to assess the current system, and most importantly, to simplify it.<sup>13</sup> As stated above, most improvements

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<sup>8</sup> See generally *id.*; see also DEP’T OF VETERANS AFF., REPORT OF THE BUDGET SUBMISSION, BENEFITS, AND BURIAL PROGRAMS AND DEPARTMENTAL ADMINISTRATION FISCAL YEAR 2011, at 2A-3 (2010), available at [http://www4.va.gov/budget/docs/summary/Fy2011\\_Volume\\_3-Benefits\\_and\\_Burial\\_and\\_Dept\\_Admin.pdf](http://www4.va.gov/budget/docs/summary/Fy2011_Volume_3-Benefits_and_Burial_and_Dept_Admin.pdf) (noting that VA processed 3,044,423 compensation claims in 2009, an estimated 3,291,766 claims in 2010, and will process an estimated 3,434,556 claims in 2011).

<sup>9</sup> Bill Russo, *Ten Years After the Battle for Veterans Judicial Review: An Assessment*, 46 FED. LAW. 26, 28 (1999) (citing *Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1998: Hearing Before the Subcomm. on VA, HUD, and Independent Agencies of the H. Comm. on Appropriations*, 104th Cong. 65 (1997) (Hon. Frank Q. Nebeker, C. J., witness)).

<sup>10</sup> Jonathan Goldstein, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 WASH. U. L. Q. 889, 921 (1989).

<sup>11</sup> Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 162 (1992) (noting that other recipients of federal benefits had the right to challenge their awards in court). See, e.g., 42 U.S.C. § 405(g) (conferring statutory right of judicial review of social security award determinations); see also *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (2009) (holding that entitlement to VA benefits is a “property interest protected by the Due Process Clause of the Fifth Amendment”).

<sup>12</sup> See Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs’ Claims Adjudication Process: The Changing Role of the Board of Veterans’ Appeals*, 46 ME. L. REV. 23, 40 (1994); Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans’ Judicial Review Act: The VA is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 46 (1994).

<sup>13</sup> See generally *Review of Veterans’ Disability Compensation: What Changes are Needed to Improve the Appeals Process? Hearing Before the S. Comm. on Veterans’ Affairs*, 111th Cong.

have taken place at the BVA level; fewer improvements have taken place at the RO level.<sup>14</sup> For example, although the effects of judicial review have still been felt at the RO level in complying with the provisions of the Veterans Claims Assistance Act of 2000 (VCAA),<sup>15</sup> many employees at the RO are simply too busy working through the large backlog of claims to take notice of court precedents.<sup>16</sup>

This Article argues that in order for judicial review to have the “profound”<sup>17</sup> effect that it was intended to on the VA, the RO, and BVA adjudication processes must be simplified so that more emphasis may be placed on decisions handed down from the CAVC. Specifically, this Article advocates for the position that the VA should eliminate one of its many levels of review and utilize attorneys at the RO level by regionalizing the BVA. Currently, the veterans’ benefits adjudication system involves an initial rating decision,<sup>18</sup> and, if a claimant appeals that decision by filing a notice of disagreement (NOD), a statement of the case (SOC) is issued.<sup>19</sup> Both the rating decision and the SOC are issued by non-attorney adjudicators at the RO.<sup>20</sup> If the veteran remains dissatisfied with the decision after the SOC is issued, he or she can file a VA Form 9 and appeal the case to the BVA.<sup>21</sup> At the BVA, the case is then adjudicated de

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111-132 (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg132/html/CHRG-111shrg132.htm>.

<sup>14</sup> It should be noted, however, as of February 1, 1990, 38 U.S.C. § 5104(b) was added to the law, which requires ROs to specify the evidence considered and the reasons for the disposition, similar to the “reasons or bases” requirement placed on the BVA. See *Crippen v. Brown*, 9 Vet. App. 412, 420 (1996).

<sup>15</sup> Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified as amended in scattered sections of 38 U.S.C.).

<sup>16</sup> See *Vietnam Veterans of America v. Shinseki*, 599 F.3d 654, 657 (D.C. Cir. 2010) (stating that “VA’s inventory of pending claims and their average time pending had increased ‘significantly’ over the previous 3 years” (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-749T, CLAIMS PROCESSING PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENT MAY BE DIFFICULT, 3 (2005))); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-562T, PROCESSING OF CLAIMS CONTINUES TO PRESENT CHALLENGES 3 (2007)); see also Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361, 370 (2009) (“[T]he workload borne by many of the links in the veterans’ benefits chain of review is staggering. Understanding the magnitude of the caseload at the various levels of decision is critical to assessing the success of the current system as well as any changes that might be proposed to it.”).

<sup>17</sup> *Effects of Judicial Review*, PARAPLEGIA NEWS, May 1993, at 47.

<sup>18</sup> See 38 U.S.C. § 315 (2006).

<sup>19</sup> See 38 C.F.R. §§ 20.201, 20.302 (2010) (noting that a decision is appealed by filing a notice of disagreement); 38 C.F.R. § 19.29 (2010); see also Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems are a Failure*, 19 WIDENER L. J. 57, 82–97 (2009) (noting the seven layers of review in the veterans’ benefits appeals process and the general inefficiency of the system).

<sup>20</sup> Parker, *supra* note 7, at 216.

<sup>21</sup> 38 U.S.C. § 7105(d)(3) (2006); 38 C.F.R. § 20.302(b).

novo by VA staff attorneys.<sup>22</sup> If the veteran is still dissatisfied with the outcome of his or her benefits claim, he or she may appeal to the CAVC.<sup>23</sup> Thereafter, in certain limited circumstances, a veteran can appeal his or her case to the United States Court of Appeals for the Federal Circuit, and ultimately, to the United States Supreme Court.<sup>24</sup> Therefore, in order to simplify the system, this Article proposes eliminating the SOC stage of review and regionalizing the BVA, such that a de novo decision by an attorney would be issued following the filing of a NOD. Furthermore, to ensure better decision-making in the process, Decision Review Officers (DROs), who are usually more experienced than RO non-attorney adjudicators that issue SOC's, should perform initial rating decisions.

Part II of this Article provides a history of the preclusion of judicial review in the processing of veterans' benefits claims. Next, Part III discusses the history of the VJRA, focusing on the establishment of the CAVC. Part IV then analyzes the effects of judicial review within the VA over the past twenty years, including its effects on the BVA and the RO. Subsequently, Part V provides recommendations as to how the effects of judicial review may further benefit the VA system by restructuring and simplifying the current veterans' benefits adjudication system. Finally, Part VI provides a brief conclusion of this Article.

## II. JUDICIAL REVIEW OF VA CLAIMS PRIOR TO THE VJRA

Despite the fact that there was a "basic presumption of judicial review" of administrative action<sup>25</sup> prior to the passage of the VJRA, the VA stood in "splendid isolation" as the only administrative agency that was exempt from judicial review.<sup>26</sup> The initial barrier to judicial review of veterans' claims was passed in 1887, when Congress provided for the specific preclusion of judicial review in cases involving veterans' pensions pursuant to the Tucker Act.<sup>27</sup> However, Congressional legislation that explicitly precluded judicial review of veterans' claims was not passed until 1924, when the World War Veterans Act provided that decisions by the Veterans Bureau were "conclusive."<sup>28</sup> In 1930, when the Veterans Administration (the predecessor to the current Department of

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<sup>22</sup> 38 U.S.C. § 7105(d)(3) (2006); 38 C.F.R. § 20.302(b).

<sup>23</sup> 38 U.S.C. § 7252(a) (2006).

<sup>24</sup> 38 U.S.C. § 7252(c) (2006).

<sup>25</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); *see also* 38 U.S.C. §211(a) (1988).

<sup>26</sup> Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 905 (1975); *see also* James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans Benefits Before Judicial Review*, 3 VETERANS L. REV. (forthcoming 2011), available at [http://works.bepress.com/james\\_ridgway/4](http://works.bepress.com/james_ridgway/4).

<sup>27</sup> Rabin, *supra* note 26, at 907 n.14.

<sup>28</sup> WILLIAM F. FOX, JR., *THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION* 6 (3d ed. 2002).

Veterans Affairs) was created to replace the former Veterans Bureau, Congress maintained this provision.<sup>29</sup> Shortly thereafter, the Economy Act of 1933 established a non-review clause of VA decisions.<sup>30</sup> Specifically, section five of the Economy Act stated that VA decisions were final, and as such, no court in the United States had the authority to conduct judicial review of such decisions.<sup>31</sup> Further, the VA was also specifically exempt from the rule-making procedures set out in the Administrative Procedure Act (APA).<sup>32</sup> The non-review clause was codified at 38 U.S.C. § 211(a) and remained in effect in various forms until the passage of the VJRA in 1988.<sup>33</sup>

Although 38 U.S.C. § 211(a) remained in effect for over fifty years, the issue of judicial review of veterans' benefits claims continuously emerged during that timeframe. Beginning in 1952, the first Congressional hearings on the topic were held.<sup>34</sup> At that time, a pattern emerged that would be repeated until the passage of the VJRA some thirty-five years later; some veterans service organizations, as well as the VA, opposed external judicial review of VA decisions, while other veterans service organizations, as well as several other organizations such as the American Bar Association, supported external judicial review of VA decisions.<sup>35</sup> Arguments against judicial review included fears that federal courts would be overburdened by an influx of claims, that the judiciary would become entangled in complex decisions best left to agency expertise, that judicial review would result in inconsistent decisions, and that the informal, pro-claimant nature of the VA system would be lost if VA claims were taken to a more adversarial setting, such as the federal court system.<sup>36</sup> In an April 23, 1959 letter, the VA summarized its position, stating:

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<sup>29</sup> *Id.* at 6–7.

<sup>30</sup> Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veteran Benefits*, 17 OHIO N.U. L. REV. 99, 100 (1990).

<sup>31</sup> *Id.*

<sup>32</sup> See Parker, *supra* note 7, at 210 (noting the VA's "long and unique history of exemption from APA rulemaking procedures and judicial review. . ."); see also Bowen v. Massachusetts, 487 U.S. 879, 908 n.46 (1988); James Hunicutt, *Another Reason to Reform the Federal Regulatory System: Agencies' Treating Nonlegislative Rules as Binding Law*, 41 B.C. L. REV. 153, 156, 189 (1999) (noting that Congress passed the Administrative Procedure (APA) Act in 1946 "to promote uniformity, fairness and public participation in how agencies operate" and that "the purpose of the APA is to bolster clarity, consistency and public participation in federal agencies").

<sup>33</sup> Kramer, *supra* note 30, at 100 n.5 ("Title 38 of the United States Code generally deals with veterans' benefits. The preclusion provision of title 38 was rewritten in 1940 and 1958. Some of the 1958 language in the non-review provision was altered in 1970 in order to clarify its meaning."). See also Kim Lacy Morris, *Judicial Review of Non-Reviewable Administrative Action: Veterans Administration Benefits Claims*, 29 ADMIN. L. REV. 65 (1977).

<sup>34</sup> Hagel & Horan, *supra* note 12, at 44–45.

<sup>35</sup> *Id.* at 45 (citing H.R. REP. NO.100-963, 10 (1998), *reprinted in* 1988 U.S.C.C.A.N. 5782).

<sup>36</sup> Goldstein, *supra* note 10, at 891; see generally PAUL C. LIGHT, *FORGING LEGISLATION* (1992).

In the final analysis, the question posed by the bill is whether there is any demonstrated need for, or real benefit to be derived from, the imposition of an additional review system with its attendant delays, uncertainties, and extra expense, upon an appellate system which has functioned fairly and efficiently for 25 years. We think not.<sup>37</sup>

Arguments in favor of judicial review included “the popular tendency to consider access to court a fundamental aspect of due process of law[,]”<sup>38</sup> as well as veterans’ perceived injustice provided by the VA system.<sup>39</sup> Additional Congressional hearings considering the issue of judicial review of veterans’ benefits claims were also conducted in 1960, 1962, 1970, 1980, 1983, and 1986.<sup>40</sup> However, the establishment of external judicial review was hindered by a lack of agreement as to what such review would entail and what form it would take.<sup>41</sup>

In the meantime, several attempts were made to challenge the provisions of 38 U.S.C. § 211(a) in court. A series of cases from the Court of Appeals for the District of Columbia (D.C. Circuit) held that veterans were only precluded from contesting denials of VA benefits; thus, a claimant could challenge the termination of benefits.<sup>42</sup> In response to this line of cases, the provisions of 38 U.S.C. § 211(a) were changed in 1970 in order to further insulate the VA from judicial review.<sup>43</sup> The rationale provided for this revision to the statute was to make it “perfectly clear that Congress intends to exclude from judicial review all determinations with respect to non-contractual benefits provided for veterans and their dependents and survivors.”<sup>44</sup>

Despite the 1970 revisions, in 1974, the Supreme Court heard the case of *Johnson v. Robison*.<sup>45</sup> In that case, Robison, a conscientious objector to the

<sup>37</sup> John J. Farley, III, *The New Kid on the Block of Veterans Law*, 38 FED. B. NEWS & J. 488 (1991) (citing *Judicial Review of Veterans’ Claims, 1960: Hearing on H.R. 947, 975, 1202, 3048, 4146, 5986, 8375, 9591, and 9632 Before the Subcomm. on Pending Judicial Review Legislation of the H. Comm. of Veterans’ Affairs*, 86th Cong. (1960) (letter to the then Chairman of the House Committee on Veteran’s Affairs by the then Administrator Sumner G. Whittier)).

<sup>38</sup> Rabin, *supra* note 26, at 905.

<sup>39</sup> Hagel & Horan, *supra* note 12, at 44.

<sup>40</sup> *Id.* at 45.

<sup>41</sup> Farley, *supra* note 37, at 488.

<sup>42</sup> Tracy v. Gleason, 379 F.2d 469, 473–74 (D.C. Cir. 1967); Thompson v. Gleason, 317 F.2d 901, 907 (D.C. Cir. 1962); Wellman v. Whittier, 259 F.2d 163, 168–69 (D.C. Cir. 1958) (stating that a law that precludes review of VA decisions concerning a claim for benefits does not also preclude challenge to forfeiture of those benefits).

<sup>43</sup> Goldstein, *supra* note 10, at 892 n.24 (“[T]he House report on H.R. 17958, which effected this change, specifically mentioned the three D.C. Circuit cases.”); H.R. REP. NO. 91-1166, at 9–11 (1970)).

<sup>44</sup> H.R. REP. NO. 91-1166 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 3723, 3731.

<sup>45</sup> 415 U.S. 361 (1974).



Vietnam War, filed a claim for VA educational benefits under the Veterans' Readjustment Act of 1966.<sup>46</sup> However, because he had performed alternate civil service rather than active duty service, his claim was denied on the basis that he did not meet the statutory "active duty" service requirements.<sup>47</sup> Robison argued that the active duty requirement was unconstitutional and asserted that the statute denied him freedom of religion and equal protection of the laws pursuant to the First and Fifth Amendments, respectively.<sup>48</sup> In response, the VA argued that 38 U.S.C. § 211(a) barred Robison's claim and that his constitutional claims were invalid.<sup>49</sup> Although Robison ultimately lost his case on the merits, the Supreme Court did grant him the right to judicial review of his claim. The Supreme Court held that 38 U.S.C. § 211(a) applied only to decisions of law or fact in VA benefit claims, and that in Robison's case, the question of law presented arose under the Constitution, not under the facts or law of his VA benefits decision.<sup>50</sup>

The Supreme Court revisited the issue of judicial review of veterans' benefits decisions in 1988 when it decided *Traynor v. Turnage*.<sup>51</sup> In that case, a group of veterans argued that the VA, through a provision that denied benefits to primary alcoholics, violated § 504 of the Rehabilitation Act.<sup>52</sup> The veterans argued that 38 C.F.R. § 3.301(c)(2), which categorized primary alcoholism as "willful misconduct," discriminated against the handicapped and violated § 504 of the Rehabilitation Act.<sup>53</sup> The Supreme Court again granted judicial review of the claim, but just as in *Robison*, the claimants also lost on the merits.<sup>54</sup> Nonetheless, the Supreme Court opened the door to judicial review of veterans' claims slightly wider by holding that it could review a VA regulation to ensure that it complied with a non-VA statute.<sup>55</sup>

Although the Supreme Court only made two exceptions to the VA's non-review statute in its fifty-five year history, the importance of these two exceptions should not be overlooked.<sup>56</sup> Once the door to judicial review was

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<sup>46</sup> *Id.* at 362–64.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 364.

<sup>49</sup> *Id.* at 364–65.

<sup>50</sup> *Id.*

<sup>51</sup> 485 U.S. 535 (1988).

<sup>52</sup> *Id.* at 540. *See also* 38 C.F.R. § 3.301(c)(2)(1987) (defining "primary alcoholism" as alcoholism unrelated to an underlying psychiatric disorder and labeling it as "willful misconduct").

<sup>53</sup> *Traynor*, 485 U.S. at 540.

<sup>54</sup> *Id.* at 546–53.

<sup>55</sup> *Id.* at 540–44.

<sup>56</sup> *But see Kramer*, *supra* note 30 (summarizing other areas where courts granted review of VA claims).

cracked, Congress began to examine the issue more closely.<sup>57</sup> In addition, veterans continued to voice their complaints to Congress about the perceived ineptitude of the VA and the arbitrary and unfair nature of its decision-making process.<sup>58</sup> The combination of these two factors soon paved the way for the enactment of the VJRA.

### III. THE VETERANS' JUDICIAL REVIEW ACT OF 1988

Although veterans and various veterans' service organizations had been dissatisfied with the VA adjudication process for many years, in the 1980's Vietnam Veterans of America (VVA) became even more dissatisfied because the VA failed to recognize many Vietnam-era veterans' claims.<sup>59</sup> In particular, veteran exposure to herbicides, such as Agent Orange, was not accepted as a basis for VA disability benefits.<sup>60</sup> Thus, the VVA pushed for judicial review as way of legitimizing Vietnam-era veterans' claims, as well as a means to create a more impartial system overall.<sup>61</sup> In vociferously advocating for judicial review, VVA "rel[ied] on the pervasive public sentiment that every American has a right to have his or her 'day in court[.]'"<sup>62</sup> Indeed, VVA pointed out to both Congress and the media that while groups such as illegal aliens and criminals had the right to judicial review, veterans did not.<sup>63</sup> Such realizations prompted many to wonder why veterans, "who defended our government in time of need . . . are now forced to petition that government to gain equal access to the same fundamental rights that [they] fought to secure for others."<sup>64</sup>

<sup>57</sup> See, e.g., Pub. L. No. 87-97 (codified as 38 U.S.C. § 7104); Pub. L. No. 87-666 (codified as 38 U.S.C. § 7015); Pub. L. No. 85-857 (codified as 38 U.S.C. § 5110).

<sup>58</sup> See, e.g., Goldstein, *supra* note 10, at 895.

<sup>59</sup> See A SHORT HISTORY OF VVA, VIETNAM VETERANS OF AM., <http://www.vva.org/history.html> (last visited Sept. 15, 2010) ("By the late 1970s, it was clear the established veterans groups had failed to make a priority of the issues of concern to Vietnam veterans.").

<sup>60</sup> See *Judicial Review of Veterans' Affairs: Hearing on H.R. 639 and S. 11 Before the H. Comm. on Veterans' Affairs*, 100th Cong., 16 (1988) (statement of Rep. Lane Evans); see also Light, *supra* note 36.

<sup>61</sup> See NAT'L ASS'N OF STATE DIRS. OF VETERANS AFFAIRS, HOUSE COMM. ON VETERANS' AFFAIRS, PROCEEDINGS OF THE 41ST ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF VETERANS AFFAIRS ON JUDICIAL REVIEW OF VA ADMINISTRATIVE DETERMINATIONS 24 (1988) (statement of Jack Powell, National Executive Director, Paralyzed Veterans of America).

<sup>62</sup> Helfer, *supra* note 11, at 162.

<sup>63</sup> *Id.*

<sup>64</sup> *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings on H.R. 585 Before the House Comm. on Veterans' Affairs*, 99th Cong. 233 (1986) (statement of Robert O. Muller, president of the VVA).

Accordingly, the VJRA was signed into law by President Ronald Reagan on November 19, 1988.<sup>65</sup> The final version of the VJRA accomplished five objectives: (1) it repealed 38 C.F.R. § 211; (2) it created the CAVC (originally known as the United States Court of Veterans Appeals or COVA),<sup>66</sup> an Article I court, to perform external, independent judicial review of decisions by the BVA; (3) it maintained the BVA as the final administrative adjudicator within the VA; (4) it abolished the \$10 limit on attorneys fees for cases being heard at the CAVC; and (5) it created an additional level of judicial review, allowing for certain cases to be appealed from the CAVC to the United States Court of Appeals for the Federal Circuit.<sup>67</sup>

The CAVC took the form of a “traditional federal appellate court”<sup>68</sup> and was completely independent of the VA.<sup>69</sup> Section 4053 of Title 38 of the United States Code provided for a chief judge and two to six associate judges to be appointed by the President for fifteen year terms.<sup>70</sup> Appeals could be heard by a single judge, by a panel, or by the full court.<sup>71</sup> In terms of jurisdiction, the CAVC was given exclusive authority to review final decisions by the BVA.<sup>72</sup> In addition, only claimants who were dissatisfied with a BVA decision obtained the right to appeal to the CAVC; the VA could not appeal a decision favorable to the claimant.<sup>73</sup> The CAVC’s decisions were to be based solely on the evi-

<sup>65</sup> Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified in various sections throughout 38 U.S.C.).

<sup>66</sup> The Court’s name was changed, effective March 1, 1999, pursuant to the Veterans Programs Enhancement Act of 1998. See Pub. L. No. 105-368, §511, 112 Stat. 3315, 3341; see also CAVC HISTORY, *supra* note 3.

<sup>67</sup> FOX, *supra* note 28, at 17.

<sup>68</sup> Farley, *supra* note 37, at 489.

<sup>69</sup> See *Watson v. Shinseki*, 23 Vet. App. 352, 352 (2010) (“[T]his Court is an independent Federal Court. The Court is not part of VA, and it is wholly separate from VA and the Board.” (citing 38 U.S.C. § 7251)).

<sup>70</sup> 38 U.S.C. § 4053 (a), (c) (recodified in 1991 as 38 U.S.C. § 7253(a),(c)); but see Veterans’ Benefits Improvements Act of 2008, Pub. L. No. 110-389, § 601, 122 Stat. 4145, 4176–77 (amending 38 U.S.C. § 7253 by increasing the total number of judges to serve on the CAVC from seven to nine, effective December 2009).

<sup>71</sup> 38 U.S.C. § 4054(b) (recodified in 1991 as 38 U.S.C. § 7254(b)); see also *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990) (“If, after due consideration, the Court determines that the case on appeal is of relative simplicity and: 1. does not establish a new rule of law; 2. does not alter, modify, criticize, or clarify an existing rule of law; 3. does not apply an established rule of law to a novel fact situation; 4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide; 5. does not involve a legal issue of continuing public interest; and 6. the outcome is not reasonably debatable . . .” then a memorandum, rather than a panel, decision will be issued.).

<sup>72</sup> 38 U.S.C. § 4052(a) (recodified in 1991 as 38 U.S.C. § 7252(a)); see *Kyhn v. Shinseki*, 23 Vet. App. 335, 343 (2010).

<sup>73</sup> 38 U.S.C. § 4052(a); 38 U.S.C. § 4066(a) (recodified in 1991 as 38 U.S.C. § 7266(a)); see, e.g., *Ricafort v. Nicholson*, 21 Vet. App. 198, 202 (2007) (“[I]n order for a claimant to obtain review of a Board decision by this Court, that decision must be final and the person adversely affected by that decision must file a Notice of Appeal within 120 days after the date on which the

dence of record that was before the VA at the time the unfavorable decision was made.<sup>74</sup> In this regard, the CAVC could not conduct *de novo* review of factual determinations made by the BVA.<sup>75</sup> Indeed, the CAVC has repeatedly made clear that “[b]ecause [it is] a Court of review, it is not appropriate for [it] to make a *de novo* finding, based on the evidence, of [a factual matter].”<sup>76</sup> After reviewing the record, the CAVC was to “affirm, modify, or reverse [the] decision of the [BVA] or to remand the matter, as appropriate.”<sup>77</sup>

The CAVC’s standard of review was based on the Administrative Procedure Act (APA).<sup>78</sup> Pursuant to 38 U.S.C. § 7261,<sup>79</sup> the CAVC may only overturn the BVA’s findings of fact if such findings are “clearly erroneous.”<sup>80</sup> Describing this standard, retired CAVC Judge John J. Farley stated:

This means that the [CAVC] does not decide whether a veteran was injured or whether such an injury was service-connected. Rather, it reviews the decision of the fact-finder, the Board of Veterans’ Appeals, on such issues and, if there is a basis in the record for the Board’s conclusion, even if this court might disagree with that conclusion, it cannot reverse the Board’s decision. This restrictive standard of review is designed to ensure

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Board decision was mailed.”); *Breeden v. Principi*, 17 Vet. App. 475, 477 (2004) (“The Secretary may not seek review of any such decision.”); *see also Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364–65 (Fed. Cir. 2005) (noting that a Board remand is not a final decision for jurisdictional purposes).

<sup>74</sup> 38 U.S.C. §4052(b) (recodified in 1991 as 38 U.S.C. §7252(b)); *see also Rogozinski v. Derwinski*, 1 Vet. App. 19, 20 (1990) (holding that the record on appeal before the Court is limited to the evidence of record at the time of the proceedings before the Secretary and BVA).

<sup>75</sup> 38 U.S.C. §4601(c) (recodified in 1991 as 38 U.S.C. §7261(c)); *see Kelly v. Brown*, 7 Vet. App. 471, 474 (1995) (“[T]he Court is unable to review the record without engaging in fact-finding, which is not the role of this Court in the first instance.” (citing *Gilbert v. Derwinski*, 1 Vet. App. 49, 56–57 (1990))).

<sup>76</sup> *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (quoting *Webster v. Derwinski*, 1 Vet. App. 155, 159 (1991)); *see also Landicho v. Brown*, 7 Vet. App. 42, 48 (1994) (stating that “[t]his Court is not generally an initial trier of facts. In appeals of BVA decisions, this Court reviews fact determinations made by the Board and does not engage in *de novo* fact-finding” (citing 38 U.S.C. §7261(a)(4), (c))); *Badua v. Brown*, 5 Vet. App. 472, 473 (1993) (“[T]he determination whether appellant’s third wife . . . is his lawful spouse for the purposes of receiving additional VA disability pension benefits . . . is a finding of fact that the Court must affirm unless that determination is found to be ‘clearly erroneous.’”); *Bledsoe v. Derwinski*, 1 Vet. App. 32, 33 (1990) (stating that the “clearly erroneous” standard must be applied in assessing the Board’s factual “determination of the capacity of the appellant’s son to support himself”); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).

<sup>77</sup> 38 U.S.C. §4052(a) (recodified in 1991 as 38 U.S.C. §7252(a)); *see, e.g., Stillwell v. Brown*, 6 Vet. App. 291, 297 (1994).

<sup>78</sup> 5 U.S.C. § 706 (2009).

<sup>79</sup> Formerly 38 U.S.C. §4061.

<sup>80</sup> 38 U.S.C. § 4061(a)(4) (recodified in 1991 as 38 U.S.C. § 7261(a)(4)).

that the court does not merely substitute its judgment for that of the Board of Veterans' Appeals on factual determinations.<sup>81</sup>

To further clarify the "clearly erroneous" standard, the CAVC, in *Boonton v. Brown*,<sup>82</sup> described this standard by stating that "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish . . . ."<sup>83</sup>

Thus, the CAVC's primary function is to review cases that have been appealed from the BVA for clear errors and questions of law.<sup>84</sup> In addition, the CAVC has the authority to set aside legal determinations made by the Secretary, the BVA, or the Chairman of the Board, as well as the authority to "compel action of the Secretary unlawfully withheld or unreasonably delayed."<sup>85</sup> The CAVC may also issue contempt citations and other writs as necessary.<sup>86</sup>

In summary, the VJRA eliminated the bar to judicial review of VA decisions by creating the CAVC pursuant to Article I of the U.S. Constitution.<sup>87</sup> The VJRA also abolished the previous fee limit for attorneys representing veterans at the CAVC.<sup>88</sup> When the CAVC convened for the first time on October 16, 1989,<sup>89</sup> a new era of veterans law was born which changed the course of the veterans' benefits adjudication process. The actual significance of those changes is discussed in the section that follows.

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<sup>81</sup> Farley, *supra* note 37, at 489; *see also* Gilbert, 1 Vet. App. 49, 52–53.

<sup>82</sup> 8 Vet. App. 368, 422 (1995).

<sup>83</sup> *Id.* at 372 (quoting Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)); *see* Padgett v. Nicholson, 19 Vet. App. 133 (2005) (en banc) (holding that under the "clearly erroneous" standard of review, a Board finding can be reversed on appeal without uncontroverted evidence in the appellant's favor and overruled any suggestion to the contrary in court's prior decisions, including *Hicks v. Brown*, 8 Vet. App. 417, 422 (1995) (quoting *Hersey v. Derwinski*, 2 Vet. App. 91, 95 (1992))).

<sup>84</sup> Farley, *supra* note 37, at 489.

<sup>85</sup> 38 U.S.C. §4061(a)(2), (3) (recodified in 1991 as 38 U.S.C. §7261(a)(2), (3)).

<sup>86</sup> 38 U.S.C. §4065(a), (b) (recodified in 1991 as 38 U.S.C. §7265(a), (b)).

<sup>87</sup> CAVC HISTORY, *supra* note 3; *see generally* Allen, *supra* note 16.

<sup>88</sup> Allen, *supra* note 16.

<sup>89</sup> The Court convened for the first time in a borrowed ceremonial courtroom from the United States District Court of the District of Columbia. *See* Farley, *supra* note 37, at 490. Chief Justice of the U.S. Supreme Court, William B. Rehnquist and Chief Judge of the CAVC, Frank Q. Nebeker, presided. *Id.* Interestingly, Rehnquist noted that the CAVC shared its birthday with the U.S. Supreme Court, which was formed on that date two hundred years earlier, in 1789. *Id.*

#### IV. THE EFFECTS OF JUDICIAL REVIEW ON THE DEPARTMENT OF VETERANS AFFAIRS

Initially, the most obvious effect of judicial review on the veterans' benefits adjudication process has been providing veterans with due process.<sup>90</sup> Throughout the past twenty years, judicial review has granted thousands of veterans their day in court.<sup>91</sup> Most notably, the addition of judicial review to the veterans' benefits arena has also brought "VA procedures within the mainstream of American administrative law."<sup>92</sup>

The past twenty years have proven that judicial review has had both positive and negative effects on the VA. The positive effects of judicial review include providing veterans with due process, attorney involvement in the claims process, better quality BVA decisions, and the production of a uniform body of law for veterans claims adjudicators to apply. The negative effects of judicial review include the increased amount of time required to process claims as well as the CAVC's high remand rate.<sup>93</sup> However, most of the effects of these changes, both positive and negative, are felt primarily at the BVA.

##### A. *Effects on the BVA*

One of the first major changes to be brought about by judicial review, and perhaps one of the most important, was the transformation of the BVA decision making process.<sup>94</sup> These changes included how BVA decisions were made as well as the format of such decisions. Prior to the era of judicial review, physicians served as Board members and were an integral part of the BVA decision process.<sup>95</sup> However, once judicial review was imposed, the CAVC often found that BVA decisions were based on the opinions of the participating Board mem-

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<sup>90</sup> See, e.g., Hagel & Horan, *supra* note 12; see also Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009).

<sup>91</sup> See, e.g., U.S. CT. OF APP. FOR VETERANS CLAIMS, ANNUAL REPORTS (2008), available at [http://www.uscourts.cavc.gov/documents/Annual\\_Report\\_-\\_20081.pdf](http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf) [hereinafter CAVC ANNUAL REPORT FY 2008] (providing the number of new claims filed at the CAVC each year from 1999 to 2008).

<sup>92</sup> William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339, 342 (2004).

<sup>93</sup> See Allen, *supra* note 16, at 378 ("Remands have also plagued matters at the Veterans Court. Disaggregating the statistics the Court provides to determine the precise number of remands is not an easy task. According to a report prepared by the House Veterans' Affairs Committee in 2007 the Veterans Court issued '3,211 merit decisions, the majority of which, more than 2,000, were remanded (some in part only) and 1,098 were affirmed.'" (quoting H. R. REP. NO. 110-789, at 18 (2008))); see also James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113 (2009).

<sup>94</sup> See generally Cragin, *supra* note 4; Cragin *supra* note 12, at 23.

<sup>95</sup> Cragin, *supra* note 4, at 501.

ber-physicians.<sup>96</sup> The participating Board member-physicians often provided findings and conclusions that were not sufficiently explained by the record, which made judicial review of the decisions difficult.<sup>97</sup>

One of the first major cases decided by the CAVC, *Colvin v. Derwinski*,<sup>98</sup> held that the BVA panels could only consider “independent medical evidence to support their findings” rather than provide their own medical judgment in the guise of a Board opinion.<sup>99</sup> Subsequent to this decision, the BVA phased out the role of physicians as Board members.<sup>100</sup> Currently, most decisions are made by a single Board member who is now referred to as a Veterans Law Judge.<sup>101</sup> The BVA has retained a small number of physicians to serve in an advisory role; however, physicians no longer participate in the BVA adjudication process, and the BVA can no longer rely on its own medical determinations in rendering a decision.<sup>102</sup>

In addition, judicial review has arguably improved the quality of BVA decisions.<sup>103</sup> Most notably, the VJRA required BVA decisions to contain a statement of “reasons or bases” with regard to “findings and conclusions on all material issues of fact and law presented on the record.”<sup>104</sup> The CAVC wasted no time in asserting that it intended to enforce this provision. In *Gilbert v. Derwinski*, the CAVC explained that a BVA decision must “contain clear analysis and succinct but complete explanations.”<sup>105</sup> Further, “[a] bare conclusory statement, without both supporting analysis and explanation, is neither helpful to a veteran nor ‘clear enough to permit effective judicial review,’ nor in compliance with statutory requirements.”<sup>106</sup> Although the BVA defended its prior format by stating that “the most significant motivation for providing a truncated explanation for the basis of a decision was the necessity of processing an enormous caseload in a timely manner with limited resources,”<sup>107</sup> the CAVC has continued to vigorously and unremittingly enforce this requirement on the

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> 1 Vet. App. 171 (1991).

<sup>99</sup> *Id.* at 175.

<sup>100</sup> Cragin, *supra* note 12, at 26.

<sup>101</sup> See 38 U.S.C. §§ 7101, 7101A (2006); it should also be noted that on occasion, the Board still uses three member panels to decide cases. However, all three panel members are Veterans Law Judges.

<sup>102</sup> Cragin, *supra* note 12, at 26.

<sup>103</sup> See Allen, *supra* note 16, at 376.

<sup>104</sup> 38 U.S.C. § 4004 (recodified in 1991 as 38 U.S.C. § 7104(d)(1)).

<sup>105</sup> 1 Vet. App. 49, 57 (1990).

<sup>106</sup> *Id.*

<sup>107</sup> Cragin, *supra* note 12, at 25.

BVA.<sup>108</sup> In fact, the need for a more adequate statement of reasons or bases continues to be the most frequently cited reason for remanding cases to the BVA.<sup>109</sup>

Despite the large number of remands that have resulted from enforcement of the reasons or bases requirement, most involved with the system agree that judicial review has had a positive effect on the overall quality of the veterans' benefits adjudication process.<sup>110</sup> Although it may take longer to issue a BVA decision in order to comply with this requirement, subsequent BVA decisions have been more helpful to veterans and have allowed for more effective judicial review.<sup>111</sup>

Judicial review has had other positive effects on the VA decision making process as well. The VJRA eliminated the \$10 fee limitation placed on attorneys representing veterans before the CAVC.<sup>112</sup> Recent legislation has also allowed attorneys to receive compensation for representing claimants before the VA.<sup>113</sup> Although the VA and some veterans' service organizations had long opposed attorney representation in the veterans' benefits adjudication system,<sup>114</sup> thus far, attorneys have had a positive effect on the system.<sup>115</sup> In this regard, a "specter of litigious, overzealous counsel has not yet materialized as a serious or systemic problem."<sup>116</sup> To the contrary, attorney representation has been shown to greatly improve a veteran's chances of winning his or her case.<sup>117</sup>

<sup>108</sup> See, e.g., *Polovick v. Shinseki*, 23 Vet. App. 48 (2009); *Anderson v. Shinseki*, 22 Vet. App. 423 (2009).

<sup>109</sup> *FOX*, *supra* note 28, at 98; see, e.g., *Spurgeon v. Brown*, 10 Vet. App. 194 (1997); *Lathan v. Brown*, 7 Vet. App. 359 (1995).

<sup>110</sup> See *Allen*, *supra* note 16, at 372; see also *Fox*, *supra* note 92, at 342.

<sup>111</sup> See *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990).

<sup>112</sup> Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988). The \$10 fee limitation was previously found at 38 U.S.C. § 3404(c). See also *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 306 (1985).

<sup>113</sup> See Pub. L. No. 109-461, § 101, 120 Stat. 3405 (2006); see also 38 U.S.C. §§ 5902-5905 (2006) (shifting the entry point for paid representation as of June 20, 2007, and amending the provisions relating to fee assessments and review of fee agreements).

<sup>114</sup> See *Victoria L. Collier & Drew Early, Cracks in the Armour: Due Process, Attorney's Fees, and the Department of Veterans Affairs*, 18 ELDER L.J. 1, 16 (2010) ("Some VSOs, such as the Disabled American Veterans, opposed proposals to increase attorney participation in the process."); *Benjamin W. Wright, The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney*, 19 FED. CIR. B.J. 433, 442 (2009) ("The rationale of keeping costs low by proscribing attorney involvement was that, if veterans had attorneys, then so would the VA and costs and time would increase.").

<sup>115</sup> *Russo*, *supra* note 9, at 28.

<sup>116</sup> *Cragin*, *supra* note 12, at 27; see generally *Wright*, *supra* note 114.

<sup>117</sup> Professor William Fox, Presentation at the Fourth Annual Judicial Conference, 10 Vet. App. No. 3, p. LXXVII (1996); see also *Kristi A. Estrada, Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How Expanding Presumptions for Service Connection Can Help*, 26 T.M. COOLEY L. REV. 113, 125 (2009) ("[A]s many as 25% of all appeals to the . . .



Furthermore, and also of much importance, judicial review has resulted in a uniform body of veterans case law.<sup>118</sup> One of the main arguments for creating the CAVC as a specialized Article I court was to confine review of VA decisions to a single forum, rather than to “regional circuits where disuniformity can arise because of the absence of intercircuit stare decisis.”<sup>119</sup> In addition, veterans law is complex, and therefore the CAVC, as a specialized court, has proven better able to make correct decisions on relevant veterans law topics.<sup>120</sup> For example, in *Shinseki v. Sanders*,<sup>121</sup> the U.S. Supreme Court found that

[i]t is the Veterans Court, not the Federal Circuit, that sees sufficient case-specific raw material in veterans’ cases to enable it to make empirically based, nonbinding generalizations about “natural effects.” And the Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal Circuit to exercise an informed judgment as to how often veterans are harmed by which kinds of notice errors.<sup>122</sup>

Thus, judicial review has had a positive effect on the BVA because CAVC decisions are received from a centralized authority, and accordingly, there is less difficulty in interpreting and applying court precedents to VA claims.<sup>123</sup> Further, because the CAVC’s judicial precedents have clearly and succinctly stated many essential veterans law principles, the VA is currently in the process of rewriting its regulations to, inter alia, directly include many court

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(CAVC) are dismissed for procedural reasons; a statistic that would likely be much lower if more veterans were represented by attorneys.”); Wright, *supra* note 114, at 445.

<sup>118</sup> Allen, *supra* note 16, at 372–73.

<sup>119</sup> Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1114 (1990).

<sup>120</sup> See *id.* at 1117.

<sup>121</sup> 129 S. Ct. 1696 (2009).

<sup>122</sup> *Id.* at 1707; cf. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999) (The Article I Court’s “expertise . . . guides it in making complex determinations in a specialized area of the law . . .”).

<sup>123</sup> See, e.g., Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 1 (1989); Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT’L L.J. 87, 110 (2008) (arguing for the benefits of courts of specialized jurisdiction, specifically that “[t]he United States should create a specialized Article III National Security Court to provide an effective, constitutionally balanced means for detention, treatment, and trial of suspected terrorists and provide for sufficient due process under domestic and international legal standards”).

precedents.<sup>124</sup> In addition to incorporating judicial precedents, the regulation rewrite project greatly simplifies the veterans' benefits regulatory scheme.<sup>125</sup>

In spite of the positive effects of judicial review, such review has also produced some negative effects on the BVA.<sup>126</sup> First and foremost, judicial review has caused a significant increase in the amount of time required to process veterans' benefits claims.<sup>127</sup> As was noted shortly after the imposition of judicial review, "applicable law, as articulated by the decisions of the [CAVC], is changing on almost a daily basis. Because of the increasing complexity and rapidly evolving state of the law, BVA decisions are lengthier, more complex, and require more time to prepare than ever before."<sup>128</sup> Although there are numerous CAVC precedents that affect the timeliness of the veterans claims process, the most significant factor has been the CAVC's extensive interpretation of the VA's duty to assist claimants, including the passage of the VCAA.<sup>129</sup> Indeed, it is essential that the BVA enforce the VA's compliance with this duty, for example, by remanding claims for proper assistance, obtaining medical records,<sup>130</sup> or providing an adequate VA medical examination.<sup>131</sup> However, complying with the duty to assist ultimately delays the BVA's decision, which in turn may delay a veteran's entitlement to VA benefits such as health care or monetary compensation.<sup>132</sup> Nonetheless, the BVA is slowly adapting to these

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<sup>124</sup> See William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 ADMIN. L. REV. 407, 417 (2009).

<sup>125</sup> See generally *id.* at 409.

<sup>126</sup> See Allen, *supra* note 16, at 377.

<sup>127</sup> See *id.* ("At the Board in 2007, the average time between the date an appeal was physically received and the date when the Board mailed a decision to the veteran was 136 days.").

<sup>128</sup> Cragin, *supra* note 12, at 33; see also DEP'T OF VETERANS AFF., REPORT OF THE CHAIRMAN FISCAL YEAR 2009 (2010), available at [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2009AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf) [hereinafter BVA CHAIRMAN'S REPORT FOR FY 2009].

<sup>129</sup> Cragin, *supra* note 12, at 35; Tom Philpott, *Law to Help Vets Also Slowed Claims*, MILITARY.COM (July 10, 2008), <http://www.military.com/features/0,15240,171460,00.html> (noting that since the passage of the VCAA in 2000, "two thirds of the time required to process a claim is committed to blocks of time set up to develop evidence to support the claim").

<sup>130</sup> See, e.g., *Loving v. Nicholson*, 19 Vet. App. 96, 102 (2005) (holding that the Secretary's duty to assist includes making "reasonable efforts to obtain relevant records," as long as the claimant "adequately identifies" those records to the Secretary and authorizes the Secretary to obtain them" (quoting Veterans Claims Assistance Act, Pub. L. No. 106-475, 114 Stat. 2096 (2000))).

<sup>131</sup> See, e.g., *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007) (holding that if VA undertakes the duty to provide an appellant with a VA medical examination, it must ensure that such examination is adequate for rating purposes).

<sup>132</sup> See *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 656 (D.C. Cir. 2010). In *Shinseki*, appellants, two veterans' associations, argued that the VA violated the APA and the Due Process Clause because of the average time it took the VA to process veterans' benefits claims. *Id.* The D.C. Circuit ultimately dismissed the case for lack of jurisdiction. *Id.*

changes—fiscal year 2008 was the most productive year for the BVA since 1991.<sup>133</sup>

The problems resulting from such lengthy delays have caused some to call for the elimination of both the BVA and the CAVC.<sup>134</sup> Indeed, a leading scholar of administrative law has stated that judicial review of veterans' claims was a failed experiment.<sup>135</sup> To this end, he noted that when Congress passed judicial review, its vision was to have the CAVC decide cases and return them to the VA for payment.<sup>136</sup> Instead, judicial review resulted in a large number of remands that prolonged claims processing time and postponed final decisions.<sup>137</sup> Moreover, the CAVC has been criticized as being too deferential to the VA.<sup>138</sup>

Related to the increased time required to process veterans' claims subsequent to judicial review is the CAVC's high remand rate.<sup>139</sup> Most cases that are remanded back to the BVA require additional development, and therefore must be further remanded back to the RO, which of course takes additional time.<sup>140</sup> In fiscal year 2008, the CAVC remanded approximately 68% of new cases filed.<sup>141</sup> Similarly, the BVA remanded 16,096 cases in fiscal year 2008, or approximately 37% of its total caseload.<sup>142</sup>

Thus, judicial review has had numerous effects on the BVA. Positive effects include the transformation of the BVA decision-making process, the improvement in the quality of BVA decisions, increased attorney representation of veterans before the BVA, and a uniform body of case law to apply from the CAVC. Negative effects include the increased time required to adjudicate a claim at the BVA and an increased number of remanded claims. Overall, however, the positive effects of judicial review far outweigh the negative effects at the BVA level.

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<sup>133</sup> DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN FISCAL YEAR 2008 I (2009), *available at* <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf> [hereinafter BVA CHAIRMAN'S REPORT FOR FY 2008].

<sup>134</sup> O'Reilly, *supra* note 5, at 233. *But see* Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN L. REV. 343, 345 (2001).

<sup>135</sup> O'Reilly, *supra* note 5, at 249.

<sup>136</sup> *Id.* at 248.

<sup>137</sup> *Id.* at 248–49.

<sup>138</sup> *Id.* at 233–34.

<sup>139</sup> *See generally* Ridgway, *supra* note 93.

<sup>140</sup> Cragin, *supra* note 12, at 35.

<sup>141</sup> CAVC ANNUAL REPORT FY 2008, *supra* note 91 (noting that out of 4128 new cases filed, 603 were “[a]ffirmed or dismissed in part, reversed/vacated & remanded in part;” 559 were “[r]eversed/vacated & remanded;” and 1625 were remanded). It should be noted, however, that a large number of these cases were remanded pursuant to a joint motion for remand by the parties, rather than by judicial decision. *Id.*

<sup>142</sup> BVA CHAIRMAN'S REPORT FOR FY 2009, *supra* note 128, at 23.

### B. *Effects at the RO Level*

As was noted above, most of the effects of judicial review, both positive and negative, have been felt at the BVA level. Although the effects of judicial review have also been felt at the RO level, due to the administrative, rather than the legal nature of the RO adjudication process, the effects of judicial review are much different at the RO level.<sup>143</sup> In this regard, a brief background of the RO adjudication process is first necessary.

While decisions at the BVA are made by attorneys, decisions at the RO are made by non-attorney adjudicators.<sup>144</sup> Thus, the decision-making process at the RO is quite different than the decision-making process at the BVA, which relies heavily on CAVC and Federal Circuit decisions, as well as citations to numerous statutes and regulations.<sup>145</sup> RO adjudicators tend to rely more on the VA Adjudication Procedure Manual, as well as medical and legal guidance from the VBA Director of Compensation and Pension Service, circulars (such as fast letters and training letters), and Service Center Manager memoranda, which state local VA offices promulgate.<sup>146</sup> These documents are generally regarded as “quasi-legal authority,” since their primary purpose is to distill practical application of laws, regulations, and court precedents for RO adjudicators.<sup>147</sup> Thus, practically speaking, “there is little, if any, distinction” between legal authority and administrative guidance at the RO level.<sup>148</sup>

Although the RO’s non-attorney adjudicators have often undergone extensive training in the area of veterans benefits law, most of this training comes from firsthand experience at the RO, administrative materials, and local VA customs and traditions, rather than formal legal training or understanding of CAVC decisions.<sup>149</sup> Accordingly, the effects of judicial review on the RO’s are only what those at VA’s Central Office tell them. VA Central Office guidance on how to interpret CAVC decisions usually comes in the form of a Decision Assessment Document (DAD).<sup>150</sup>

Nonetheless, the effects of judicial review can still be felt at the RO level.<sup>151</sup> By far, the greatest effect of judicial review on RO adjudicators is in the

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<sup>143</sup> See generally Parker, *supra* note 7, at 208.

<sup>144</sup> *Id.* at 208.

<sup>145</sup> *Id.* at 220.

<sup>146</sup> *Id.* at 210. For further explanation of these documents, see *supra* notes 18–24.

<sup>147</sup> *Id.* at 211.

<sup>148</sup> *Id.* at 212.

<sup>149</sup> Parker, *supra* note 7, at 217.

<sup>150</sup> *Id.* at 210 n.24 (stating that the DAD “is another form of VBA circular that is a self-contained summary of precedential court cases for use by the VBA adjudicator. The DAD provides a summary of the case, the impact of the case on VBA, and a discussion of the facts and the court’s reasons”).

<sup>151</sup> See Cragin, *supra* note 12, at 35.

area of claims development.<sup>152</sup> Indeed, many have commented that one of the CAVC's greatest contributions to the veterans benefits process "has been to breathe life into the long-standing statutory obligation of the VA 'to assist . . . a claimant in developing the facts pertinent to the claim.'"<sup>153</sup> The clearest illustration of this statement is the passage of the VCAA, which redefined the VA's duties to notify and assist.<sup>154</sup> Thus, because nearly all of the development required pursuant to the VA's duty to assist takes place at the RO level, many RO employees have come to regard judicial review as negatively impacting the veterans' benefits adjudication process.<sup>155</sup> In fact, between 1998 and 2008, the average time to process a veteran's initial disability claim increased from four months to six months, even though the number of VA claims processors had doubled.<sup>156</sup>

As will be discussed in the section that follows, this Article asserts that simplifying the veterans' benefits adjudication process by eliminating at least one level of RO review is required to provide veterans with more timely decisions. In addition, having attorney adjudicators at the RO level by regionalizing the BVA would also result in more quality decisions issued, thus preventing many remands and allowing judicial review to have its intended effects on the VA as a whole. As is explained more fully below, the best way to achieve this objective is to restructure the VA adjudication process as outlined in this paragraph.

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<sup>152</sup> See *id.*

<sup>153</sup> Barton F. Stichman, *The Era of Reform Generated by the U.S. Court of Veterans Appeals*, 38 FED. B. NEWS & J. 494, 494 (1991).

<sup>154</sup> Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000) (codified as amended in scattered sections of 38 U.S.C.).

<sup>155</sup> See Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claims Adjudication Systems are a Failure*, 19 WIDENER L.J. 57, 85 (2009) ("The development step is continuous; it does not stop with the accumulation of records from the NARA or the VA . . . . This step overlaps with adjudication because the RO will continue to accumulate evidence while adjudicating a claim."); see also Parker, *supra* note 7, at 218 ("[N]onlawyer VBA adjudicators are blindsided by the Federal Circuit's reading of an unfamiliar and purely legal civil law concept into VA administrative law. Indeed, the nonlawyer VBA adjudicator, being more familiar with such sub-regulatory resources than the Savitz Court itself, or most lawyer BVA adjudicators, performs the impossible mental task of trying to recall a mention of such a concept as the common law mailbox rule in any of VA's regulations, directives, or memoranda, or in any previous training. Finding none, the nonlawyer VBA adjudicator is more likely to ask, 'Where did such a rule come from?' The nonlawyer finds little direction or practicality in the highly ethereal legal standards of shifting burden-bearing in the raising and rebuttal of such a presumption with which even the courts struggle.").

<sup>156</sup> Philpott, *supra* note 129.

## V. RECOMMENDATIONS

From the time of our nation's founding, notions of law and justice have garnered a great deal of respect.<sup>157</sup> Indeed, in order to "think like [a] lawyer," one must be able to master "the art of legal analysis."<sup>158</sup> This includes the ability to learn rules of law, learn how courts interpret the law, and develop the ability to foresee what the law may become.<sup>159</sup> In so doing, "[e]mphasis is placed on the parsing of statutes and, of particular importance in a case law system, of judicial opinions; on learning the contours of fundamental legal doctrines; [and] on professional values[.]"<sup>160</sup> Thus, as is the case with other professions, the "distinguishing mark" of a lawyer "is knowledge that other people do not have . . . ."<sup>161</sup>

Non-attorney adjudicators at the RO fall under this category of individuals who do not have specialized knowledge of the law.<sup>162</sup> Although RO adjudicators are frequently praised for their "vast institutional knowledge" of the VA system, the fact of the matter is that many do not possess the analytical abilities to "think like a lawyer."<sup>163</sup> There are two reasons often cited for not having lawyers as adjudicators at the RO: (1) the VA benefits adjudication process is traditionally a nonadversarial system, and (2) the introduction of lawyers would delay the already vast number of claims that are handled by the RO each year.<sup>164</sup>

With regard to the former reason, the traditional nonadversarial nature of the VA system, it should be noted that when the VJRA eliminated the \$10 fee limit for attorneys representing veterans at the CAVC, many feared that the VA system would become flooded with adversarial attorneys.<sup>165</sup> However, several years after the imposition of judicial review, these fears proved to be unfounded.<sup>166</sup> Indeed, this still appears to be the case as the VA has recently lifted

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<sup>157</sup> See WILSON HUH, *THE FIVE TYPES OF LEGAL ARGUMENT* 7 (2d ed. 2008).

<sup>158</sup> *Id.* at 11.

<sup>159</sup> *Id.*

<sup>160</sup> RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 1 (2004).

<sup>161</sup> STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 7 (3d ed. 2007).

<sup>162</sup> Parker, *supra* note 7, at 208.

<sup>163</sup> Interviews with several employees who have both BVA and RO experience, in Washington, D.C. (Apr. 30, 2009 and May 6, 2009) [hereinafter Interviews] (notes from interviews on file with author; those being interviewed wished to remain anonymous). Employees noted that lawyers were phased out as RO adjudicators in the 1970s due to an increase in market salaries. *Id.*

<sup>164</sup> See, e.g., *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that "[t]his court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant" and describing "the historically non-adversarial system of awarding benefits to veterans"); *Trilles v. West*, 13 Vet. App. 314, 326 (2000) (describing "the VA pro-claimant nonadversarial claims adjudication process").

<sup>165</sup> See Cragin, *supra* note 12, at 27; Wright, *supra* note 114, at 443.

<sup>166</sup> See Wright, *supra* note 114, at 445.

its ban on lawyers representing veterans at the VA.<sup>167</sup> Moreover, attorney involvement at the CAVC has been viewed as overwhelmingly positive.<sup>168</sup>

With regard to the latter reason, the vast number of claims handled by the RO, the author agrees that the sheer number of claims handled by the RO should not be underestimated. In fiscal year 2008, the VA estimated that it received 891,547 new claims, over 53,000 more than the 838,141 received in fiscal year 2007.<sup>169</sup> In order to deal with this large number of claims, RO adjudicators are expected to produce 3.5 credits per day, whereas attorneys at the BVA are expected to produce 3 credits per week.<sup>170</sup> Thus, at the RO, most adjudicators are focused on the quickest way to decide a claim, and not necessarily on the policy behind the cases or the statutes and regulations being applied.<sup>171</sup> The unfortunate reality of this system is that most RO adjudicators are focused on “how they can get the claim off their desk” as opposed to how to best serve veterans.<sup>172</sup> As one VA employee observed, “doing justice and moving the case along clash[.]”<sup>173</sup> Thus, the argument against using attorneys as adjudicators at the RO level is that attorneys with formal legal training conduct a more in-depth analysis of each claim, which therefore would increase the overall time required to process the claim.

Accordingly, throughout the past twenty years of judicial review in the veterans’ benefits arena, the greatest effect, by far, has been on the increase in processing time required to adjudicate a veteran’s claim.<sup>174</sup> Despite this fact, judicial review has consistently been regarded as a positive addition to the veterans’ benefits adjudication system.<sup>175</sup> Thus, in order to more fully appreciate

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<sup>167</sup> Pub. Law No. 109-461, § 101, 120 Stat. 3408 (2006); *see also* 38 U.S.C. §§ 5902–5905 (2006) (eliminating the prohibition on the charging of fees for services of an attorney or agent provided before the Board of Veterans’ Appeals makes its first final decision in the case). As amended, section 5904 now allows accredited attorneys and agents to charge fees for services provided after a notice of disagreement (NOD) has been filed with the VA Regional Office (RO) in the case.

<sup>168</sup> Russo, *supra* note 9, at 28.

<sup>169</sup> U.S. DEP’T OF VETERANS AFFAIRS, DEP’T OF VETERANS AFFAIRS PERFORMANCE SHORTFALL ANALYSIS, available at <http://www4.va.gov/budget/report/> (On the lower right hand of the webpage, next to text reading “Fiscal Year 2008,” click the hyperlink “Archive.”).

<sup>170</sup> Interviews, *supra* note 163. At the RO, cases with multiple issues are divided so that the adjudicator receives one credit for every seven issues. *Id.* At the BVA, decisions and remands, no matter how many issues, are each assigned one credit no matter how many issues are involved in the claim; however, cases that involve a decision and a remand receive 1.5 credits. *Id.* *See Quantity v. Quality: Examining the Veterans Benefits Administration’s Employee Work Credit and Management Systems*, Hearing Before the H. Committee on Veterans’ Affairs, 111th Cong. (2010) (statement of Eric Christenson, Managing Director of Health Research Policy, Institute for Public Research CAN).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See, e.g.*, Philpott, *supra* note 129.

<sup>175</sup> *See, e.g.*, Farley, *supra* note 37; Hagel & Horan, *supra* note 12; Russo, *supra* note 9.

the effects of judicial review while continuing to provide veterans with quality, timely decisions, the VA should simplify its claims adjudication process by eliminating one if its many levels of review and regionalizing the BVA.

Currently, there are several levels of review of a VA benefits claim. Veterans Claims Examiners (VCEs) first handle a claim by conducting initial development, such as requesting service treatment records when a claim is filed and sending out initial VCAA notice letters.<sup>176</sup> Next, Veterans Service Representatives (VSRs) handle the claim.<sup>177</sup> VSRs are not raters, but are responsible for additional evidentiary development, such as ordering a VA medical examination.<sup>178</sup> Next, Rating Veterans Service Representatives (RVSRs) perform the initial adjudication of the veteran's claim via an RO rating decision.<sup>179</sup> If a veteran files an NOD, the veteran may elect to have a Decision Review Officer (DRO) conduct a de novo review of the claim. DROs tend to have years of VA experience which translates into a considerable amount of institutional knowledge.<sup>180</sup> Accordingly, DROs perform a more in-depth review than RVSRs.<sup>181</sup> Although some DROs are attorneys, there is little, if any, attorney involvement at the RO level.<sup>182</sup> Currently, the VA has pilot programs in place in several ROs to explore various automated methods that may assist in quickening the pace of the adjudication process.<sup>183</sup> Despite these programs, however, VA attorneys are typically not involved in the process until a veteran appeals his or her case to the BVA.<sup>184</sup>

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<sup>176</sup> Interviews, *supra* note 163.

<sup>177</sup> *Id.*; see also Day in the Life: Veterans Service Representative, available at [http://www4.va.gov/JOB/career\\_types/walker-video.asp](http://www4.va.gov/JOB/career_types/walker-video.asp).

<sup>178</sup> Interviews, *supra* note 163.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See Regina Dennis, *Waco VA Regional Office Adds 100 Jobs to Speed Up Claims Process*, THE WACO TRIBUNE (Feb. 19, 2010), available at <http://www.wacotrib.com/news/Waco-VA-Regional-Office-adds-100-jobs-to-speed-up-claims-process.html> (noting that the VA currently has pilot programs in place at the RO's located in Pittsburgh, PA; Baltimore, MD; Little Rock, AR; and Providence, RI).

<sup>184</sup> See *MacKlem v. Shinseki*, No. 08-1409, 2010 WL 3155498 (Vet. App. Aug. 10, 2010) (stating that "In an effort to reduce delays, VA has added thousands of new claims processors . . . . The adjudicators are generally not attorneys." (citing DANIEL HARRIS, FINDINGS FROM RATERS AND VSOS SURVEYS 14 (The CNA Corporation, May 2007) (published as part of the Veterans' Disability Benefits Commission))), available at <http://www.vetscommission.org/displayContents.asp?id=4> (finding that 26% of adjudicators do not have college degrees, 40% have college degrees, and 34% have "[m]ore [t]han [c]ollege"); see also Parker, *supra* note 7, at 208 ("In VA, there are both nonlawyer adjudicators at the local VA offices within the agency of the Veterans Benefits Administration (VBA) and lawyer adjudicators at the appellate agency of the Board of Veterans' Appeals.").



Because there are so many levels of review of veterans' benefits claims, the process is quite lengthy and oftentimes complex. Howard Pierce, Chief Executive Officer of PKC Corp., a software company that works specifically with health care clients, testified in 2008 that his company was tasked to set up a computerized decision-making model to be used by VA claims adjudication staff.<sup>185</sup> He stated that his staff was "stunned" by the complexity of the process.<sup>186</sup> Pierce elaborated that "we have never seen anything more complex [than the VA claims system]."<sup>187</sup>

Thus, it seems that if there is one lesson to be taken away from the past twenty years of judicial review, it is that the veterans' benefits adjudication process must somehow be simplified. The easiest and most logical way to achieve this goal would be to eliminate one of the many levels of review. To this end, since there is a need for better decision making at the RO level, this Article proposes eliminating the role of the RVSR, having DROs perform initial rating actions, and regionalizing the BVA, such that BVA attorneys would issue decisions in place of the current SOC.<sup>188</sup> Currently, the SOC re-adjudicates a veteran's claim after a NOD has been filed.<sup>189</sup> The main argument for keeping the SOC is that it provides a veteran with the laws and regulations pertinent to his or her appeal; however, such regulations could just as easily be included in an initial rating decision.<sup>190</sup> Because the SOC is essentially a duplicative rating decision for claims that have been appealed, the overall veterans' benefits adjudication process would benefit from eliminating this stage of review.

Eliminating or regionalizing the BVA is not a new topic. In designing an "ideal" system for administering veterans' benefits, one of the nation's leading scholars in veterans law, William F. Fox, stated that he would "simply eliminate the Board of Veterans' Appeals."<sup>191</sup> As rationale for this proposal, he stated that by using attorneys and Administrative Law Judges (ALJs) to conduct formal adjudications at the RO level, the VA would be able to simplify its current system of intra-agency review.<sup>192</sup> He also indicated that in attempting to create such an ideal system, "judicial review must be preserved."<sup>193</sup> He concluded by stating that he "firmly believe[d] that good decisions by [his] newly-commissioned corps of ALJs in a system in which lawyers fully participate

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<sup>185</sup> Philpott, *supra* note 129. For more information on PKC, see <http://www.pkc.com/AboutUs.aspx>.

<sup>186</sup> Philpott, *supra* note 129.

<sup>187</sup> *Id.*

<sup>188</sup> 38 C.F.R. § 19.29 (2010).

<sup>189</sup> See 38 U.S.C. 7105(d)(1) (2006).

<sup>190</sup> See 38 U.S.C. § 7105(d)(1)(A)–(C) (2006).

<sup>191</sup> Fox, *supra* note 92, at 344.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 345.

through the entire agency decisional process would likely produce fewer appeals.”<sup>194</sup>

Similarly, as was noted previously, one of the nation’s leading scholars in administrative law, James T. O’Reilly, has also suggested eliminating the BVA.<sup>195</sup> In this proposal, O’Reilly noted that at that time, the average time to resolve a VA appeal was 745 days and that justice delayed was justice denied.<sup>196</sup> Overall, O’Reilly vigorously argued that changes to the current system were necessary in order to produce better results in a more timely fashion.<sup>197</sup>

The author of this Article agrees that at least one layer of review must be removed in order to reconcile quality with quantity in VA benefits decisions, but that the level removed should not be the BVA. The VJRA deliberately maintained the BVA as the final administrative adjudicator at the VA.<sup>198</sup> Further, given modern notions of due process and the need for independent review outside the agency, the CAVC should not be the level that is eliminated either.<sup>199</sup> Indeed, veterans would be better served by regionalizing rather than eliminating the BVA and placing BVA attorneys at each of the ROs. First, the BVA should not be eliminated because as noted above, the CAVC is an integral part of the veterans benefits system, and to do so would most likely greatly increase the CAVC’s workload, resulting in further delays in the process. Second, although many at the RO argue that the in-depth review conducted by attorneys would slow down the current claims adjudication process, this would most likely be only a temporary setback. Indeed, once attorneys are involved at the RO, veterans claims will be better developed early on, thus preventing the need for many remands later in the process.<sup>200</sup>

Third, RO decisions will become better written and articulated. Currently, one of the main reasons for remands from the BVA to the RO is due to the “subpar writing skills” of many claims adjudicators.<sup>201</sup> Although the CAVC often remands BVA decisions on similar grounds (reasons or bases), BVA decisions are, generally speaking, more detailed and better articulated than most RO rating decisions and DRO decisions.<sup>202</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> O’Reilly, *supra* note 5, at 233.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See Farley, *supra* note 37 (noting that in discussing the need for judicial review of veterans’ benefits, the House Veterans’ Affairs Committee favored abolishing the Board, whereas the Senate Veterans’ Affairs Committee did not, and that in the agreed upon compromise that would become the Veterans’ Judicial Review Act of 1988, the Board remained intact and the CAVC was created); see also Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687 (1988).

<sup>199</sup> See, e.g., *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009).

<sup>200</sup> See Fox, *supra* note 92, at 346.

<sup>201</sup> Interviews, *supra* note 163.

<sup>202</sup> *Id.* This statement is also affirmed by the author’s own knowledge of working with both BVA and RO decisions at the BVA and the CAVC.

Fourth, there are a great number of practical benefits that would result from having BVA attorneys located at ROs. For example, time would be saved because claims files would not have to be shipped from the RO to the BVA's centralized location in Washington, D.C. In addition, both attorney and non-attorney adjudicators would benefit from daily interactions that would allow the sharing of various types of institutional knowledge and understanding of court precedents. Finally, RO adjudicators would be less likely to pass on a decision they think is likely to be reversed or remanded when the BVA reviewer is down the hall, rather than an anonymous figure located in the Nation's capital.

In summary, the past two decades of judicial review in the veterans' benefits arena has had a positive impact on the VA and veterans themselves. However, due to the increased time required to process veterans' claims, the system must be simplified. As described above, the most beneficial way to do so would be to eliminate the SOC and regionalize the BVA. In addition to decreasing the VA's current multi-layered system of review, utilizing attorneys at the RO level will translate into a more fully developed record and, as such, fewer remands from the CAVC.

## VI. CONCLUSION

Today, it is easy to take judicial review in the United States for granted. The idea of judicial review has become so deeply entrenched in our present constitutional law system that it is difficult to imagine how our legal system would function without it.<sup>203</sup> However, for many veterans, this was not always the case. As has been discussed above, veterans were excluded from judicial review until the passage of the VJRA in 1988. Thus, in analyzing the effects of twenty years of judicial review on the veterans' benefits adjudication system, it is important not to take judicial review for granted. On the contrary, it is important to continue to reflect on how judicial review has affected the VA, veterans, and their advocates.

With regard to veterans themselves, one would be hard-pressed to find much information suggesting that they have been substantially harmed by judicial review. Although the amount of time it takes for the CAVC to issue a decision has increased from 364 days in 1999 to 446 days in 2008,<sup>204</sup> judicial review has produced numerous benefits to the veterans' benefits adjudication system. In this regard, the VA now issues more quality decisions, and it has interpreted many statutes and regulations in a more pro-veteran manner. The consensus is that since judicial review, veterans have received more equitable treatment in VA decisions.<sup>205</sup> Likewise, although some veterans' service organizations feared that they would become obsolete in light of the VJRA provisions that

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<sup>203</sup> D. Brooks Smith, *Judicial Review in the United States*, 45 DUQ. L. REV. 379, 382 (2007).

<sup>204</sup> CAVC ANNUAL REPORT FY 2008, *supra* note 91.

<sup>205</sup> Hagel & Horan, *supra* note 12, at 50.

allowed attorneys to represent veterans at the CAVC, judicial review has certainly not put any veterans' service organizations "out of business."<sup>206</sup>

However, the first twenty years of judicial review have also taught us that despite these benefits, the system is not perfect. Celebrating the twentieth anniversary of judicial review in the VBA system and the elevation of the VA to a cabinet department<sup>207</sup> invites judicious analysis of the pros and cons of the veterans' benefits adjudication process. As is argued throughout this Article, the past twenty years of judicial review have served as a reminder that the VA system is in desperate need of simplification.

Because there are so many levels of review of a VA decision that is appealed—an initial rating decision, a statement of the case, a possible supplemental statement of the case, a BVA decision, and a CAVC decision—there is a noticeable disconnect between each level of review. Furthermore, because each decision prior to the BVA decision is made by non-attorney adjudicators, there is an even greater divide between the RO and the BVA, even though both are part of the VA. Thus, in order to simplify the overall adjudication process, the BVA should be regionalized, effectively eliminating the SOC level of review. In addition to decreasing the time required to process appeals, having attorneys performing RO adjudications will enhance the quality of initial VA decisions and will ensure that CAVC precedents play a larger role in such decisions.

Therefore, after two decades of judicial review, the veterans' benefits system has improved, but it still has a long way to go. Although the initial impact of judicial review on the VA was certainly "profound,"<sup>208</sup> twenty years later, its effects have shown that it is now time to "simplify." Providing veterans with due process was undoubtedly a step in the right direction, and it was a step that was long overdue. Although those within the VA have remained reluctant to change,<sup>209</sup> the passage of the VJRA provides hope that further extraordinary changes to the system, such as the ones suggested in this article, are possible, and, more importantly, that such changes would greatly benefit the current veterans' benefits adjudication process.

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<sup>206</sup> Russo, *supra* note 9, at 29.

<sup>207</sup> See DEP'T. OF VETERANS AFFAIRS, VA HISTORY IN BRIEF 26, available at <http://www1.va.gov/opa/feature/history/docs/histbrf.pdf> (noting the elevation of the BVA to a cabinet department on March 15, 1989).

<sup>208</sup> *Effects of Judicial Review*, *supra* note 17.

<sup>209</sup> See Parker, *supra* note 7, at 211 (describing the attitude of VA adjudicators: we "[a]re apt to be strongly prejudiced in favor of whatever is countenanced by antiquity, enforced by authority, and recommended by custom" (alteration in original) (quoting Robert Hall)).

